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# The Fifth Amendment Right Against Self-Incrimination: An In-Depth Look at McKune v. Lile

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# **The Fifth Amendment Right Against Self-Incrimination: An In-Depth Look at *McKune v. Lile***

## TABLE OF CONTENTS

- I. INTRODUCTION
- II. BACKGROUND
  - A. *The Fifth Amendment Right Against Self-Incrimination*
  - B. *Components of the Fifth Amendment*
    - 1. Incrimination
    - 2. Compulsion
    - 3. When the Express Assertion of the Right Against Self-Incrimination Is Waived
- III. SUMMARY OF THE FACTS
- IV. ANALYSIS OF THE COURT'S OPINION
  - A. *The Plurality Ruling*
    - 1. The *Sandin* Ruling
    - 2. Analysis of the Present Case
    - 3. Analysis of Prior Rulings & Comparison with *Lile*
  - B. *Justice O'Connor's Concurring Opinion*
  - C. *Justice Stevens's Dissenting Opinion*
- V. IMPACT
  - A. *Judicial Impact*
  - B. *Legislative and Social Impact*
- VI. SOLUTIONS
  - A. *Immunity*
  - B. *Alternative Treatment*
- VII. CONCLUSION

## I. INTRODUCTION

Should incarcerated sex offenders be given reduced Fifth Amendment constitutional protections in order to advance the states' interests of rehabilitation, deterrence, and societal protection? Sex offenders are a serious threat to society, especially to juveniles.<sup>1</sup> The rate of recidivism for sex offenders is higher than for any other type of criminal, thus creating a vital state interest in rehabilitating these offenders.<sup>2</sup> It has been proven that rehabilitative programs help reduce recidivism by teaching sex offenders to manage their impulses.<sup>3</sup> However, "[a]n important component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct."<sup>4</sup> This poses a problem when inmates are ordered to participate in a rehabilitation program that requires full acceptance and disclosure of all sexual crimes and misconduct, but retains the right to report these disclosures for potential prosecution.<sup>5</sup> The prisoner is now presented with a difficult choice: 1) incriminate himself and risk the possibility of prosecution for past crimes; 2) incriminate himself and risk a perjury charge for now admitting to a crime that he denied at trial; or 3) refuse to incriminate himself, by way of his Fifth Amendment right to remain silent, and then face consequences for failing to participate in a court-ordered program.<sup>6</sup>

This situation provides a penalty for either choice: if the inmate speaks, he faces penalization; if he remains silent, he faces the imposition of negative consequences.<sup>7</sup> The Court has determined that certain types of penalties can compel incriminating testimony, thus creating a Fifth Amendment violation.<sup>8</sup> Therefore, how can a rehabilitation program that creates the above conditions be constitutional under the Fifth Amendment?

Courts have struggled with this question for years. In the process of finding the answer, "[they] . . . have unevenly applied the [Fifth Amendment] right to convicted sex offenders who, as a condition of court-

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1. *McKune v. Lile*, 536 U.S. 24, 32 (2002). The majority of reported sex offenses in 1995 were committed against persons under 18 years of age. *Id.*

2. *See id.* at 32-33 (citing U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 27 (1997)).

3. *Lile*, 536 U.S. at 33.

"[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. 'Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals.'"

*Id.* (quoting U.S. DEPT. OF JUSTICE, NAT. INSTITUTE OF CORRECTIONS, A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER xiii (1988)).

4. *Lile*, 536 U.S. at 33. Denial greatly impedes therapy. *Id.* (citing H. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 F. ON CORRECTIONS RES. 30 (1991)). "[O]ffenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity." *Id.*

5. *Id.* at 33-34.

6. *Jamie Tanabe, Right Against Self-Incrimination v. Public Safety: Does Hawaii's Sex Offender Treatment Program Violate The Fifth Amendment*, 23 U. HAW. L. REV. 825, 826 (2001).

7. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 279 (1998).

8. *Lile*, 536 U.S. at 49-50.

ordered therapy, must admit responsibility for their crime.”<sup>9</sup> The law requires that the protection against compulsion and self-incrimination be afforded to every citizen, but it does not provide the framework for determining what consequences will create compulsion in the prison setting.<sup>10</sup> The Supreme Court has attempted to make this determination by defining “incrimination” and “compulsion”; distinguishing the imposition of a penalty versus the removal of a privilege; stressing the importance of inmate rehabilitation; and combining these concepts to form guidelines.<sup>11</sup>

This note examines the Court’s decision in *McKune v. Lile*<sup>12</sup> and discusses the implications of the Court’s decision on the standards utilized for determining what conditions create a Fifth Amendment violation in the prison context.<sup>13</sup> Part II provides background information on the Fifth Amendment right against self-incrimination. Part III presents the facts and procedural history of *Lile*, followed by an analysis of the plurality, concurring, and dissenting opinions in Part IV. Part V discusses the judicial, legislative and social implications of *Lile*. Part VI suggests possible solutions for avoiding the social implications and further constitutional claims. Finally, Part VII concludes with an overview of the likely ramifications of the Court’s decision.

## II. BACKGROUND

### *A. The Fifth Amendment Right Against Self-Incrimination*

No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.<sup>14</sup>

“The Fifth Amendment right against self-incrimination provides us with some of our most treasured protections—preservation of our autonomy, privacy, and dignity against the threat of state coercion.”<sup>15</sup> It guarantees the

9. Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347 (1998).

10. See *Lile*, 536 U.S. at 36-37.

11. *Id.* at 29-40.

12. 536 U.S. 24 (2002) (plurality opinion).

13. See *id.* at 29-40.

14. U.S. CONST. amend. V.

15. *State v. Reyes*, 2 P.3d 725, 733 (Haw. Ct. App. 2000) (stating that “[c]ourt-ordered programs that require convicted sex offenders to admit responsibility for the offense of which they were

right to remain silent when faced with the possibility of incriminating oneself and protects us against the use of coerced confessions.<sup>16</sup> The right not only applies in a defendant's criminal trial, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."<sup>17</sup> The Fifth Amendment right "has two components: incrimination and compulsion."<sup>18</sup> In order for the right to apply, a person must first have an appreciable fear of incrimination and then must be compelled to make an incriminating statement.<sup>19</sup>

## B. Components of the Fifth Amendment

### 1. Incrimination

"The [right against self-incrimination] protects the dignity of the individual by ascribing sanctity to his freedom to keep private information about himself."<sup>20</sup> It attaches only when a people have real fear of incriminating themselves.<sup>21</sup> "The danger of self-incrimination must be 'real and appreciable . . . not a danger of an imaginary and unsubstantial character . . . so improbable that no reasonable man would suffer it to influence his conduct.'"<sup>22</sup> Although the Fifth Amendment right is guaranteed by the Constitution, there are some restrictions.<sup>23</sup> The Supreme Court has stated that the right "against self-incrimination does not terminate

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convicted under threat of probation revocation and imprisonment violate these protections.") (quoting Kaden, *supra* note 9, at 390-91).

[The privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life; [and] our distrust of self-deprecatory statements . . .

Kaden, *supra* note 9, at 352-53 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)) (citations omitted).

16. *Lile v. McKune*, 224 F.3d 1175, 1179 (10th Cir. 2000), *rev'd*, 536 U.S. 24 (2002).

17. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

18. *Lile*, 224 F.3d at 1179.

19. *United States v. Monia*, 317 U.S. 424, 427 (1943).

20. Kaden, *supra* note 9, at 353.

21. *See Lile*, 224 F.3d at 1179; *Minor v. United States*, 396 U.S. 87, 98 (1969) (upholding convictions of defendants on grounds that there is no real likelihood of incrimination and only "real and appreciable" risks support a Fifth Amendment claim).

22. Tanabe, *supra* note 6, at 833 (quoting *Brown v. Walker*, 161 U.S. 591, 599 (1896)); *see also Lile*, 224 F.3d at 1179 (stating that "[i]f the possibility of incrimination is too speculative or insubstantial, the privilege does not attach.").

23. *McKune v. Lile*, 536 U.S. 24, 36 (2002).

at the jailhouse door," but that lawful incarceration does place limitations on a defendant's exercise of that right.<sup>24</sup>

## 2. Compulsion

The second component of the Fifth Amendment right is compulsion.<sup>25</sup> Compulsion entails the government coercing an individual to disclose incriminating information.<sup>26</sup> "[T]he Supreme Court emphasized that . . . the imposition of penalties is the mechanism by which persons are compelled to incriminate themselves."<sup>27</sup> The Court has stated that unless a person is given immunity before providing potentially incriminating testimony, he cannot be forced to choose between answering questions and being punished for exercising his right to remain silent.<sup>28</sup> Compulsion is generally not presumed to exist; rather, an individual must first invoke the right against self-incrimination in order for the court to find that he answered against his will.<sup>29</sup>

Therefore, once individuals assert their rights, they cannot be required to answer a question if they reasonably believe it will be incriminating.<sup>30</sup> However, "if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself."<sup>31</sup> Accordingly, witnesses may always voluntarily testify in matters that may incriminate them; the Fifth Amendment does not preclude this.<sup>32</sup> Witnesses will only be considered to have been 'compelled' when they have claimed the protection and are then coerced to testify.<sup>33</sup>

## 3. When the Express Assertion of the Right Against Self-Incrimination Is Waived

There are two situations in which the Court has declared that the right

24. *Id.*

25. *Lile*, 224 F.3d at 1179.

26. Tanabe, *supra* note 6, at 834.

27. *Lile*, 224 F.3d at 1180; *see also* Lefkowitz v. Cunningham, 431 U.S. 801, 804-05 (1977).

28. *See* Garner v. United States, 424 U.S. 648, 661 (1976) (indicating that where the assertion of the privilege is penalized it "foreclos[es] a free choice to remain silent[] and therefore . . . compell[s] the incriminating testimony."); *Lile*, 224 F.3d at 1180-81.

29. *United States v. Monia*, 317 U.S. 424, 427 (1943).

30. *See id.*

31. *Garner*, 424 U.S. at 654. "Witnesses who failed to claim the privilege were once said to have 'waived' it, but [the Supreme Court has] recently abandoned this 'vague term' . . . and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.'" *Minnesota v. Murphy*, 465 U.S. 420, 427-28 (1984) (quoting *Garner*, 424 U.S. at 654 n.9).

32. *Garner*, 424 U.S. at 654.

33. *Monia*, 317 U.S. at 427.

against self-incrimination is self-executing: custodial interrogations and penalty cases.<sup>34</sup> The custodial setting contains “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>35</sup> The Court thus presumes the presence of coercive government conduct in custodial settings where there has been a formal arrest or restraint on freedom of movement.<sup>36</sup> “Therefore, because of the ‘inherently compelling’ nature of custodial interrogations, the right against self-incrimination need not be asserted.”<sup>37</sup>

A penalty situation is where “the State not only compel[s] an individual to appear and testify, but also [seeks] to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions ‘capable of forcing the self-incrimination which the Amendment forbids.’”<sup>38</sup> In penalty cases, the defendant is basically left with no choice at all. He either has to face a penalty for invoking his right against self-incrimination or incriminate himself to avoid being penalized.<sup>39</sup> The Supreme Court has declared this situation intolerable and therefore does not require an individual to invoke the right for protection when in a penalty situation.<sup>40</sup>

### III. SUMMARY OF THE FACTS

In 1983, a jury convicted Robert G. Lile (Lile) for rape, aggravated sodomy, and aggravated kidnapping, although he maintained that the sex was consensual.<sup>41</sup> Both the Kansas Supreme Court and Federal District Court upheld the conviction.<sup>42</sup> In 1994, a few years before Lile was to be released, he was ordered by prison officials to participate in a Sexual Abuse Treatment Program (SATP).<sup>43</sup> The SATP required its participants to complete and sign an “Admission of Responsibility” form and to complete a sexual history form.<sup>44</sup> These forms required participating inmates to discuss

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34. *Murphy*, 465 U.S. at 429-34.

35. *Id.* at 430 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

To dissipate ‘the overbearing compulsion . . . caused by isolation of a suspect in [] custody,’ the *Miranda* Court required the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it.

*Murphy*, 465 U.S. at 430 (quoting *United States v. Washington*, 431 U.S. 181, 187 n.5 (1977)) (citation omitted).

36. *Id.*

37. Tanabe, *supra* note 6, at 835.

38. *Murphy*, 465 U.S. at 434.

39. *Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966).

40. *Murphy*, 465 U.S. at 434.

41. *Lile*, 536 U.S. at 29. Lile lured a high school girl into his car and forced her, at gunpoint, to perform oral sodomy on him. He then proceeded to drive her to a field to rape her. *Id.* at 30.

42. *Id.*

43. *Id.* The SATP is an 18-month program that provides daily counseling. *Id.* at 34.

44. *Lile*, 536 U.S. at 30. Participants were required to take a polygraph exam to verify the information provided on the forms. *Id.* Experts argue that the polygraph examination is not really considered a valid psychological test. The rates of consistency and standardization need to be higher. Tanabe, *supra* note 6, at 853-54.

and accept responsibility for the crimes for which they were imprisoned and to discuss the details of any prior sexual activities, regardless of whether these other acts would constitute uncharged criminal offenses.<sup>45</sup> Unfortunately for the prisoners, the information the SATP requires them to provide is not privileged.<sup>46</sup> In fact, Kansas law requires any uncharged sexual offenses involving minors to be reported to officials.<sup>47</sup>

Once aware of the SATP requirements, Lile refused to participate in the program.<sup>48</sup> As a result of his refusal, prison officials informed him that he would be transferred to a maximum-security prison and a four-person, instead of two-person, cell.<sup>49</sup> Additionally, "his privilege status would be reduced from Level III to Level I."<sup>50</sup> This reduction would affect his "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges."<sup>51</sup> Lile based his refusal to participate in the SATP on the ground that "the required disclosures of his criminal history would violate his Fifth Amendment privilege against self-incrimination."<sup>52</sup>

In response to the threats made by Kansas prison officials, Lile brought an action under 42 U.S.C. § 1983 against the prison warden and the secretary of the department.<sup>53</sup> He was seeking an injunction to stop them from revoking his privileges.<sup>54</sup> The United States District Court for the District of Kansas entered summary judgment for Lile, concluding that the consequences for his refusal to participate in the SATP constituted coercion in violation of the Fifth Amendment.<sup>55</sup> It also stated that "because respondent had testified at trial that his sexual intercourse with the victim was consensual, an acknowledgement of responsibility for the rape on the 'Admission of Guilt' form would subject respondent to a possible charge of perjury."<sup>56</sup>

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45. *Lile*, 536 U.S. at 29. A polygraph examination was administered to verify the accuracy of the offender's statements about his sexual history. *Id.*

46. *Id.* at 30.

47. *Id.* There is no evidence that incriminating information has ever been disclosed by the SATP leading to the prosecution of an inmate. *Id.*

48. *Id.* at 31.

49. This maximum-security unit would be a more dangerous environment than the unit Lile was currently occupying and would remain in if he participated in the program. *Id.*

50. *Lile*, 536 U.S. at 30.

51. *Id.* at 31.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Lile*, 536 U.S. at 31.



The Court of Appeals for the Tenth Circuit affirmed this decision.<sup>57</sup> It held that “the compulsion element of a Fifth Amendment claim can be established by penalties that do not constitute deprivations of protected liberty interests under the Due Process Clause.”<sup>58</sup> It found that the reduction in prison privileges and housing status was a penalty because of its substantial impact on Lile and “because that impact was identical to the punishment imposed by the Department for serious disciplinary infractions.”<sup>59</sup> The court did, however, acknowledge that the Kansas policy served important interests of rehabilitation and public safety, but concluded that those interests could be met without violating the Constitution.<sup>60</sup> Following this decision, the warden petitioned to the U.S Supreme Court for certiorari and the request was granted.<sup>61</sup>

#### IV. ANALYSIS OF THE COURT’S OPINION

##### A. *The Plurality Ruling*

Delivering a plurality opinion, Justice Kennedy began his analysis by giving a brief overview of the Kansas Sexual Abuse Treatment Program (SATP) and the interests served by refusing to offer immunity to participants.<sup>62</sup> It was first stated that the program, in order for participants to understand their behavior and how to prevent recidivism, requires accepting responsibility for past offenses.<sup>63</sup> Additionally, the potential for further punishment reinforces the gravity of the sex offenders’ offenses and thus aids in achieving the goal of the program, rehabilitation.<sup>64</sup> The Court stated that offering immunity would “absolve many sex offenders of any and all cost for their earlier crimes.”<sup>65</sup>

After reiterating the Fifth Amendment rights, the Court stated that the prison setting is different from free society and therefore different considerations must be taken into account.<sup>66</sup>

‘[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system . . . .’ A

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57. *Id.*

58. *Id.*

59. *Id.* at 31-32. In the court’s opinion, “the fact that the sanction was automatic, rather than conditional, supported the conclusion that it constituted compulsion.” *Id.* at 32.

60. *Id.* The court suggested treating the inmates’ admissions as privileged or granting them immunity. *Id.*

61. *Id.*

62. *Lile*, 536 U.S. at 32-35.

63. *Id.* at 33-34.

64. *Id.* at 34. The Court stated that the lack of punishment for past crimes may lead sex offenders to think that society does not consider their crimes to be serious. This would interfere with the rehabilitative process. *Id.*

65. *Id.*

66. *Id.* at 36. The Fifth Amendment “provides that no person ‘shall be compelled in any criminal case to be a witness against himself.’” *Id.* at 35.

broad range of choices that might infringe constitutional rights in free society falls within the expected conditions of confinement of those who have suffered a lawful conviction.<sup>67</sup>

Because federal and state officials are assigned the task of administering the prisons, they need the requisite authority to do so.<sup>68</sup> The Court explained that it is from this need for authority that the limitations on prisoners' privileges stem.<sup>69</sup>

In describing the standard the Court previously applied in *Sandin v. Connor*<sup>70</sup> as a reasonable means to assessing what constitutes compulsion, the Court asserted that in order to establish a Fifth Amendment violation, a defendant must show that "the consequences of [his or her] choice to remain silent are closer to the physical torture against which the [c]onstitution . . . protects."<sup>71</sup> Justice Kennedy indicated that the Court has previously held in several cases, where the ramifications faced by the defendants were much worse than those Lile faced, that the hard choice between silence and the consequences was not compelled.<sup>72</sup> Stating the question presented was "whether . . . [Kansas'] State[] program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right[.]" Justice Kennedy followed with an analysis of *Sandin* and three prior rulings.<sup>73</sup>

### 1. The *Sandin* Ruling

Justice Kennedy first began with a description of the decision in *Sandin*. The Court held "that challenged prison conditions cannot give rise to a due process violation unless those conditions constitute 'atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life.'"<sup>74</sup>

67. *Id.* at 36 (citation omitted).

68. *Lile*, 536 U.S. at 37.

69. *Id.*

70. 515 U.S. 472 (1995).

71. *Lile*, 536 U.S. at 37.

72. *Id.* at 43-44.

73. *Id.* at 35. The Court indicated that if immunity was offered to participants, the self-incrimination privilege would not be implicated.

74. *Lile*, 536 U.S. at 37. The Court ruled that:

[a]t the time of [Conner's] punishment, disciplinary segregation mirrored those conditions imposed upon inmates in administrative segregation and protective custody . . . . And, his confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction . . . . [T]he chance that the misconduct finding will affect his parole status is simply too attenuated to invoke the Due Process Clause's procedural guarantees.

*Sandin*, 515 U.S. at 486, 487.

In *Sandin v. Conner*, prisoner Conner brought a civil rights action against Hawaii prison officials and the state of Hawaii for imposing segregated confinement for misconduct.<sup>75</sup> The defendant claimed that officials had deprived him of procedural due process when he was not permitted to present witnesses at his disciplinary hearing.<sup>76</sup> The Court ruled that there was no Due Process Clause violation.<sup>77</sup> It stated that “Conner’s discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.”<sup>78</sup> The plurality in *Lile* announced that although the ruling in *Sandin* may not provide a “precise parallel” for determining if there is compelled self-incrimination, it does provide useful guidelines for determining whether conditions constitute “atypical and significant hardships.”<sup>79</sup> Its reasoning for believing that *Sandin* provides a useful guideline is that the Court in *Sandin* “underscore[s] the axiom that a convicted felon’s life in prison differs from that of an ordinary citizen.”<sup>80</sup> The plurality stated that because *McKune v. Lile* involves the context of a prisoner rehabilitation program, the same considerations utilized in *Sandin* are relevant to *Lile*.<sup>81</sup>

## 2. Analysis of the Present Case

The Court declared the appropriate test for a Fifth Amendment violation in the context of a prison rehabilitation program as such:

A prison [] rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.<sup>82</sup>

The plurality then continued on and applied the test to the facts of the present case.<sup>83</sup>

The plurality first pointed out that Lile’s refusal to participate in the program did not extend his incarceration period nor affect his eligibility for “good-time credits” or parole.<sup>84</sup> Additionally, his transfer from a medium-security unit to a maximum-security unit was due to limited space for those participating in programs, and was not intended as a punishment for

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75. *Id.* at 475.

76. *Id.*

77. *Id.* at 487.

78. *Id.* at 486.

79. *Lile*, 536 U.S. at 37.

80. *Id.*

81. *Id.*

82. *Id.* at 37-38.

83. *Id.* at 37-41.

84. *Id.* at 38.

exercising his Fifth Amendment rights.<sup>85</sup> What the plurality did not address was why all his other privileges were reduced as well. Wasn't this added reduction a punishment? This is where the plurality tried to classify the consequences imposed upon Lile for not participating in the SATP as more like a denial of privileges than a penalty.<sup>86</sup> It claimed that enhancing the punishment imposed upon Lile, transfer to maximum-security, was no different than "denying him the 'leniency' he claims would be appropriate if he had cooperated," i.e., remaining in medium-security.<sup>87</sup> But the prison didn't just move Lile to another facility, they reduced all his hard earned privileges from Level III to Level I status.<sup>88</sup> The plurality addressed this issue by stating that "[a]n essential tool of prison administration . . . is the authority to offer inmates various incentives to behave. The Constitution accords prison officials wide latitude to bestow or revoke these prerequisites as they see fit."<sup>89</sup>

The plurality further emphasized its position, that inmates must expect restrictions by the mere fact of their conviction, by discussing *Hewitt v. Helms*.<sup>90</sup> In that case, the Court held that an inmate's transfer to a different facility, which resulted in the loss of access to a multitude of programs, did not implicate a liberty interest.<sup>91</sup> The Court stated that there is no requirement that the government make the exercise of the Fifth Amendment cost free.<sup>92</sup>

### 3. Analysis of Prior Rulings & Comparison with *Lile*

After analyzing the standard set forth in *Sandin* and applying it to the facts in *Lile*, the plurality turned to three cases in which the Court found no Fifth Amendment violation and compared these cases to *Lile*.<sup>93</sup> The cases utilized for comparison were *Baxter v. Palmigiano*,<sup>94</sup> *Minnesota v. Murphy*,<sup>95</sup> and *Ohio Adult Parole Authority v. Woodard*.<sup>96</sup> The theory

85. *Lile*, 536 U.S. at 38.

86. *Id.* at 45-46.

87. *Id.*

88. *Id.* at 30.

89. *Id.* at 39.

90. 459 U.S. 460, 467 (1983).

91. *Lile*, 536 U.S. at 39.

92. *Id.* at 41; see also *Jenkins v. Anderson*, 447 U.S. 23 (1980) (holding that the Fifth Amendment was not violated by use of a pre-arrest silence to impeach a defendant's credibility).

93. *Lile*, 536 U.S. at 42. The Court also briefly compared *Lile* to *McGautha v. California*, 402 U.S. 183 (1971) (upholding a procedure that allowed a defendant's statements made for the purposes of avoiding the death penalty to be used against him as evidence). *Id.* at 42. The plurality stated that the consequences faced by Lile were much less than those faced by McGautha. *Id.*

94. 425 U.S. 308 (1976).

95. 465 U.S. 420 (1984).

96. 523 U.S. 272 (1998).

behind the comparison was to show that because the defendants in these cases faced much worse penalties than Lile, and the Court found no constitutional violation in each of them, Lile's situation did not equal a constitutional violation either.<sup>97</sup>

The first case discussed by the Court was *Baxter*.<sup>98</sup> In *Baxter*, Palmigiano, an inmate of the California penal institution in San Quentin, filed an action under 42 U.S.C. § 1983 alleging that the disciplinary procedures at the prison violated his due process rights.<sup>99</sup> The defendant objected to the fact that his silence at a disciplinary hearing would be held against him and sought damages and injunctive relief.<sup>100</sup> The Court in *Baxter* acknowledged that, according to the rule in *Griffin v. California*,<sup>101</sup> "the Fifth Amendment prohibits courts from instructing a criminal jury that it may [infer guilt] from a defendant's failure to testify."<sup>102</sup> However, the *Baxter* Court refused to "extend the *Griffin* rule to the context of state prison disciplinary hearings because [they] 'involve the correctional process and important state interests other than conviction for crime.'"<sup>103</sup> The *Lile* plurality pointed out that where Lile faced the loss of certain privileges for asserting his right to remain silent, Palmigiano faced thirty days in punitive segregation in addition to a reduction in prison status.<sup>104</sup> The plurality stated that this hard choice was greater than the one faced by Lile, yet the Court still found no compulsion, and thus no constitutional violation.<sup>105</sup>

The second case the plurality analyzed was *Murphy*.<sup>106</sup> In 1980, Murphy pleaded guilty to a sex-related charge and, as a condition of his probation, was required to participate in a sex offense treatment program and to be honest "in all matters" when meeting with his probation officer.<sup>107</sup> Murphy's probation officer, knowing Murphy had admitted to his treatment counselor that he had committed a rape and murder, questioned Murphy about the alleged incident.<sup>108</sup> Murphy, fearful of being returned to prison if he remained silent, admitted guilt.<sup>109</sup> As a result of this admission, he was later indicted for first-degree murder.<sup>110</sup> Murphy sought to suppress the confession, stating that it was obtained in violation of his Fifth Amendment rights.<sup>111</sup> The Court found no Fifth Amendment violation, despite Murphy's

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97. See *Lile*, 536 U.S. at 42-45.

98. *Id.* at 42-43.

99. *Baxter*, 425 U.S. at 313-14.

100. *Id.* at 313.

101. 380 U.S. 609 (1965).

102. *Lile*, 536 U.S. at 42.

103. *Id.* (quoting *Baxter*, 425 U.S. at 319).

104. *Id.* at 42-43.

105. *Id.*

106. 465 U.S. 420 (1984).

107. *Id.* at 422.

108. *Id.* at 423-24.

109. *Id.* at 422-425.

110. *Id.* at 425. Marshall Murphy had been questioned twice about the rape and murder of a teenage girl, but no charges were ever filed. *Id.* at 422. It wasn't until he was serving probation for a separate charge of false imprisonment that he admitted to the previous rape and was charged for the crime. *Id.* at 423-25.

111. *Murphy*, 465 U.S. at 425.

fear of returning to prison, and stated that “since [he] revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations.”<sup>112</sup> The plurality utilized the facts of this case to illustrate by comparison that the consequences faced by Lile did not amount to compulsion in violation of the Fifth Amendment, since the conditions faced by Murphy, which were far worse, did not.<sup>113</sup>

The final case analyzed by the plurality for comparison with *Lile* was *Woodard*.<sup>114</sup> Eugene Woodard was convicted of aggravated murder and sentenced to death.<sup>115</sup> Even though Woodard had not requested an interview, a clemency hearing was scheduled for him.<sup>116</sup> He objected to the short notice and requested that counsel be present, but both requests went unanswered.<sup>117</sup> In response, Woodard filed a 42 U.S.C. § 1983 claim, alleging that Ohio’s clemency process violated his Fifth Amendment right to remain silent.<sup>118</sup> “[He] claimed to face a Hobson’s choice: He would damage his case for clemency no matter whether he spoke and incriminated himself, or remained silent and the clemency board construed that silence against him.”<sup>119</sup> The Court ruled that “the pressure [Woodard] felt to speak to improve his chances of clemency did not constitute unconstitutional compulsion.”<sup>120</sup> This analysis was the plurality’s final attempt at showing that Lile was not compelled to incriminate himself, by means of comparing his situation to that of a defendant faced with far worse conditions in which the Court stated there was no compelled self-incrimination.<sup>121</sup>

After discussing each of the previous rulings, the plurality declared that the consequences Lile faced were not substantial enough to create unconstitutional compulsion; they were merely losses of privileges bearing a rational relation to the legitimate penological objectives of rehabilitation and deterrence.<sup>122</sup> The plurality also briefly addressed the dissent’s attempt to distinguish these cases from *Lile*.<sup>123</sup> The dissent pointed out two issues in

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112. *Id.* at 440.

113. *Lile*, 536 U.S. at 43.

114. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

115. *Id.* at 277. Eugene Woodard was convicted of aggravated murder committed during a carjacking. He was given the death penalty and appealed his sentence. The Appeals Court affirmed his death sentence. *Id.*

116. *Id.* The Ohio Constitution gives the Governor the power to grant clemency, but that power has been delegated to the Ohio Adult Parole Authority. *Id.* at 276. A clemency hearing must be conducted within forty-five days of the execution date and then a recommendation will be made to the Governor. *Id.* at 276-77.

117. *Id.* at 277.

118. *Id.*

119. *Lile*, 536 U.S. at 43.

120. *Id.*

121. *See id.*

122. *Id.* at 44-45.

123. *Id.* at 43-44.

the case: 1) the fact that Lile's penalties followed automatically from choosing to remain silent and, 2) that Lile was directed to participate in the SATP rather than given the choice.<sup>124</sup> The plurality stood by its decision and stated that:

[w]hile the automatic nature of the consequence may be a necessary condition to finding unconstitutional compulsion, however, that is not a sufficient reason alone to ignore *Woodard, Murphy, and Baxter* . . . . [O]ne cannot answer the question whether the person has been compelled to incriminate himself without first considering the severity of the consequences.<sup>125</sup>

In response to the dissent's second argument regarding the involuntary nature of the program, the plurality stated that the entire compulsion analysis depends on the consequences of deciding not to participate, not the nature of the program.<sup>126</sup>

#### *B. Justice O'Connor's Concurring Opinion*

Justice O'Connor delivered a concurring opinion.<sup>127</sup> She stated that she agreed with the plurality's decision that the consequences facing Lile for his refusal to speak did not amount to compulsion for purposes of the Fifth Amendment privilege.<sup>128</sup> In fact, she described the changes in his living conditions and reduction of his prison privileges as minor.<sup>129</sup> Justice O'Connor did, however, disagree with the plurality on the standard for compulsion.<sup>130</sup> She took the position of Justice Stevens, a dissenting Justice, and stated that the "Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard [the Court] ha[s] adopted for evaluating due process claims in prisons . . . ."<sup>131</sup>

Justice O'Connor announced that she believes imposing the risk of punishment is acceptable "so long as the actual imposition of such punishment is accomplished through a fair criminal process."<sup>132</sup> Before ending her opinion, Justice O'Connor commented on her discontent with the

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124. *Id.* at 44.

125. *Lile*, 536 U.S. at 44.

126. *Id.* at 44-45.

127. *Id.* at 48-54 (O'Connor, J., concurring).

128. *Id.* at 48-49.

129. *Id.* at 51.

Because the prison is responsible for caring for respondent's basic needs, his ability to support himself is not implicated by the reduction in wages he would suffer as a result. While his visitation is reduced as a result of his failure to incriminate himself, he still retains the ability to see his attorney, his family, and members of the clergy.

*Id.*

130. *Id.* at 52-53.

131. *Lile*, 536 U.S. at 48 (O'Connor, J., concurring).

132. *Id.* at 53 (citation omitted).

plurality's failure to "set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination."<sup>133</sup>

### C. Justice Stevens's Dissenting Opinion

Justice Stevens, who was joined by Justices Souter, Ginsburg, and Breyer, delivered a dissenting opinion.<sup>134</sup> The dissent agreed with the plurality that offering incentives to prisoners to participate in a program does not amount to compulsion.<sup>135</sup> However, this is where agreement with the plurality opinion ended.<sup>136</sup> The dissent actually restated the issue at hand as "whether the State may punish an inmate's assertion of his Fifth Amendment privilege with the same mandatory sanction that follows a disciplinary conviction for an offense such as theft, sodomy, riot, arson, or assault."<sup>137</sup> It disagreed with the plurality's characterization of the sanctions as modest and stated that they are actually quite severe.<sup>138</sup> It declared that the benefit of obtaining sex offense confessions does not justify evisceration of the Fifth Amendment.<sup>139</sup>

The dissent stated that none of the Court's prior opinions suggests that the prison context should narrow the protection of any established right or give a different meaning to compulsion.<sup>140</sup> It then began to distinguish the cases discussed by the plurality from the facts at issue in this case. The first case discussed was *Ohio Adult Parole Auth. v. Woodard*.<sup>141</sup> The dissent pointed out that Lile was ordered to participate in the SATP, as opposed to the respondent in *Woodard*, who voluntarily participated in an interview.<sup>142</sup> It stated that "[l]ike a direct judicial order to answer questions in the courtroom, an order from the State to participate in the SATP is inherently coercive."<sup>143</sup> The dissent also added that the automatic nature of the penalty for refusing to participate further established the presence of coercion.<sup>144</sup>

The next case distinguished by the dissent was *Baxter*.<sup>145</sup> The Court in *Baxter* declared that it was "undisputed that an inmate's silence in and of itself [was] insufficient to support an adverse decision by the Disciplinary

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133. *Id.*

134. *Lile*, 536 U.S. at 54-72 (Stevens, J., dissenting).

135. *Id.* at 54.

136. *See id.*

137. *Lile*, 536 U.S. at 54 (Stevens, J., dissenting).

138. *Id.*

139. *Id.*

140. *Id.* at 54-55.

141. 523 U.S. 272 (1998).

142. *Lile*, 536 U.S. at 59 (Stevens, J., dissenting).

143. *Id.* at 60.

144. *Id.*

145. 425 U.S. 308 (1976).



Board.”<sup>146</sup> The dissent stated that, unlike the situation in *Lile* where the penalty for silence was automatically imposed, refusing to incriminate oneself “was only one of a number of factors to be considered by the finder of fact in assessing a penalty” in *Baxter*.<sup>147</sup>

The dissent then turned to *Murphy*.<sup>148</sup> In *Murphy*, the Court stated that according to a Minnesota statute, probation revocation was not automatic for invoking the Fifth Amendment privilege.<sup>149</sup> The dissent pointed out the difference between *Lile* and *Murphy*, stating that there was merely a risk of consequences for a voluntary choice in *Murphy* versus automatic sanctions for disobeying an order to participate in the SATP in *Lile*.<sup>150</sup>

The dissent stated that the plurality disregarded the automatic nature of the penalty and the voluntary nature of the program when making their decision.<sup>151</sup> It declared this to be an “unjustified departure” from prior rulings.<sup>152</sup> “[T]he plurality must point to something beyond respondent’s status as a prisoner to justify its departure from our precedent.”<sup>153</sup>

The next section of the dissenting opinion focused on the actual privileges to be revoked for refusal to participate in the SATP.<sup>154</sup> The dissent stated that although the plurality viewed the consequences as the mere loss of potential benefits or as insignificant penalties, it strongly disagreed.<sup>155</sup> It emphasized that it took Lile six years to obtain his Level III prison status; a level to which he would not be able to earn his way back in his remaining time in prison.<sup>156</sup> Taking this status away would not only result in dignitary harms, but in loss of tangible privileges as well.<sup>157</sup> The dissent stated that inmates develop certain expectations over time regarding the conditions of their confinement.<sup>158</sup> “These conditions . . . form the baseline against which any change must be measured, and rescinding them now surely constitutes punishment.”<sup>159</sup> The Court has established that the government can offer benefits to those willing to provide incriminating information, but that it cannot threaten to take away privileges for asserting the right to remain silent.<sup>160</sup>

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146. *Lile*, 536 U.S. at 60 (Stevens, J., dissenting) (quoting *Baxter*, 425 U.S. at 317).

147. *Id.*

148. 465 U.S. 420 (1984).

149. *Lile*, 536 U.S. at 61 (Stevens, J., dissenting). “Murphy could not reasonably have feared that the assertion of the privilege would have led to revocation.” *Id.*

150. *See id.* at 61-62.

151. *Id.*

152. *Id.* at 62.

153. *Id.*

154. *Id.* at 62-68.

155. *Lile*, 536 U.S. at 62 (Stevens, J., dissenting).

156. *Id.* The Court stated that this type of sanction is the same imposed upon those who commit serious disciplinary infractions. *See id.* at 63.

157. *Id.* Lile’s earning capacity would be lowered, his canteen expenditures would be reduced, the amount of personal property allowed in his cell would be decreased, and he would be transferred to a maximum-security unit from his medium-security unit. *Id.* at 63.

158. *Lile*, 536 U.S. at 64.

159. *Id.*

160. *Id.* at 65.

The dissent asserted that the plurality blurred the lines between penalties and incentives.<sup>161</sup> It stated that the plurality found no problem with modest sanctions as long as they are not given a punitive label, hence the label of "loss of privileges."<sup>162</sup> It also pointed out that the plurality contended that the reduction in prison status and transfer from medium-security to maximum-security was merely for the purpose of freeing up more space for those who chose to participate in the program, not as a penalty.<sup>163</sup> The dissent addressed this argument by stating that no evidence was presented to show a shortage of space for participants, thus making "the only plausible explanation for the transfer . . . [to be] punishment for refusing to participate in the program."<sup>164</sup> The dissent concluded that the aggregate effect of the penalties imposed upon Lile created compulsion, thus a violation of his Fifth Amendment right.<sup>165</sup>

## V. IMPACT

### A. Judicial Impact

The plurality focused on its prior rulings and analyzed the definitions of compulsion and incrimination, but it never spent any time discussing what actually constitutes compulsion in the prison context.<sup>166</sup> It discussed the fact that prison life is different from free society and that prisoners' rights have limitations placed upon them, but failed to state how far those limitations go.<sup>167</sup> The plurality did, however, provide some broad views about factors to consider when evaluating whether compulsion occurred.<sup>168</sup> It stated that "[t]he compulsion inquiry must consider the significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison systems."<sup>169</sup> It even declared that the *Sandin* ruling provided useful instruction for determining whether compelled self-incrimination exists.<sup>170</sup> However, the plurality failed to provide even

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161. *Id.*

162. *Id.* at 64.

163. *Id.* at 66.

164. *Lile*, 536 U.S. at 67 (Stevens, J., dissenting).

165. *Id.* at 68-71. "No matter what the goal, inmates should not be compelled to forfeit the privilege against self-incrimination simply because the ends are legitimate or because they have been convicted of sex offenses." *Id.* at 71.

166. *See id.* at 29-38.

167. *Id.* at 36-39.

168. *Id.* at 37-40.

169. *Id.* at 37.

170. *Lile*, 536 U.S. at 37-38.

one example of what constitutes a severe enough consequence, in the prison context, to amount to a Fifth Amendment violation.<sup>171</sup>

So what actually constitutes compulsion in the prison context? That question was never really answered.<sup>172</sup> The plurality spent a good amount of time comparing the facts of *Lile* to prior cases in which the Court found no Fifth Amendment violation.<sup>173</sup> It looked at *Woodard*, *Baxter*, and *Murphy*, and as a result, declared there to be no constitutional violation in *Lile*.<sup>174</sup> It appeared that it was almost stating, since the conditions faced by the prisoners in those cases were much worse than *Lile* faced in this case, and there was no compulsion in those cases, that there must not be compulsion here.

The plurality also made the argument that removal of a privilege does not constitute a significant penalty, or really a penalty at all.<sup>175</sup> But in the prison context, if an inmate has earned privileges and has been living with those privileges for some time, it appears that taking them away would constitute a penalty.<sup>176</sup> It seems that the line between a penalty and the loss of a privilege has been blurred.

Time will ultimately tell whether the plurality's broad application of *Sandin* will be followed in future opinions. Although this issue is clearly not one of a black and white nature, it appears to demand a narrower rule in order to prevent injustice.<sup>177</sup> As more Fifth Amendment compelled self-incrimination cases are filed by prisoners, the Court will have to design a clearer test, or risk increasing the level of infringement upon prisoners' rights.<sup>178</sup>

#### *B. Legislative and Social Impact*

The plurality's interpretation of *Sandin* and its application to the facts in *Lile* substantially impact the rights of prisoners, specifically sex offenders.<sup>179</sup> As time passes, the broad application of the rule will expand to include more and more offenses as permissible consequences for invoking the Fifth Amendment right against self-incrimination. It will end up resulting in the oversight of compulsion in order to advance legitimate penological goals.<sup>180</sup> The dissent properly addressed this issue when it said:

[u]ntil today the Court has never characterized a threatened harm as 'a minimal incentive.' Nor have we ever held that a person who has made a valid assertion of the [Fifth

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171. See *id.* at 30-38.

172. See *id.*

173. *Id.* at 42-45.

174. *Id.*

175. See *id.* at 43-45.

176. *Lile*, 536 U.S. at 61-62 (Stevens, J., dissenting).

177. See *id.* at 53-54 (O'Connor, J., concurring).

178. See *id.*

179. *Id.* at 39-43.

180. See *id.* at 54-56.

Amendment] privilege may nevertheless be ordered to incriminate himself and sanctioned for disobeying such an order. This is truly a watershed case.<sup>181</sup>

In order to truly provide the right against self-incrimination to prisoners, Congress must clearly define what constitutes sufficiently severe consequences to create compulsion in the prison setting and implement a change in rehabilitation programs to protect sex offenders.<sup>182</sup>

## VI. SOLUTIONS

### A. Immunity

"The interests at stake in the adjudication of sex offenders are naturally opposed to each other. On one hand, the Fifth Amendment protects the offender's interest in . . . privacy . . . . On the other hand, the state has strong dual interests in rehabilitating the offender and protecting its citizens."<sup>183</sup> Offering SATP participants immunity can satisfy both of these interests.<sup>184</sup> It would also eliminate future Fifth Amendment constitutional violations and challenges with regard to sex abuse rehabilitation programs.<sup>185</sup> The plurality itself stated that if inmates were offered immunity, the self-incrimination privilege would not be implicated.<sup>186</sup> However, the concern with offering immunity is that participants will not take their past crimes seriously, thus causing an interference with the rehabilitative process.<sup>187</sup>

"The reality that offenders are sentenced to treatment programs involuntarily, the tendency of sex offenders to be especially prone to denial, and offenders' fears regarding the incriminating consequences of disclosing their offenses, all challenge an offender's capacity to participate successfully in treatment programs."<sup>188</sup> Eliminating denial and accepting responsibility for past sexual misconduct is key to rehabilitation.<sup>189</sup> With the provision of immunity, participants would be able to discuss their past wrongs and learn

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181. *Id.* at 54 (Stevens, J., dissenting).

182. *See id.* at 47.

183. Kaden, *supra* note 9, at 382.

184. *Id.* at 385.

185. *See id.*

186. *Lile*, 536 U.S. at 35.

187. *Id.*

188. Kaden, *supra* note 9, at 385-86.

189. *See id.* at 366-67. "[D]enial must be overcome for therapeutic work to proceed effectively." *Id.* at 367.

from them without the fear of their admissions being used to convict them later.<sup>190</sup>

Another concern with offering immunity is that it eliminates the possibility of pursuing criminal prosecution for participants' past sex crimes.<sup>191</sup> This should not be a worry.

“[T]he privilege [against self-incrimination] has never been construed to mean that one who invokes it cannot subsequently be prosecuted. [The] sole concern is to afford protection against being ‘forced to give testimony leading to the infliction of ‘penalties affixed to . . . criminal acts.’”<sup>192</sup> Therefore, a participant could still be prosecuted based upon independent evidence; it is only his statements that could not be used against him.<sup>193</sup> It appears that offering immunity to SATP participants provides a solution that benefits both sides equally; the state may still rehabilitate sex offenders and reduce recidivism, while the inmate receives protection from self-incrimination.<sup>194</sup>

### *B. Alternative Treatment*

Approaches to treatment can be modified to protect the participants' Fifth Amendment rights while also satisfying the rehabilitative and deterrence goals of the state.<sup>195</sup> The form of treatment currently practiced by the Kansas SATP is called the confrontational approach.<sup>196</sup> This approach revolves around getting the offender to come to terms with his behavior and admit his offenses.<sup>197</sup> Denial is not tolerated.<sup>198</sup> It is in this type of situation that self-incrimination issues may arise.<sup>199</sup> Offenders are forced to admit guilt as a first step to rehabilitation.<sup>200</sup>

An alternative to the confrontational approach is the motivational approach.<sup>201</sup> “While the confrontational approach may confirm ‘in the offender[] the feeling that [he has] no control over [his] behavior and that controls have to be imposed,’ the motivational approach attempts to engender a desire within the offender to change—to do something for himself.”<sup>202</sup> Negotiation tactics are utilized in this approach, as opposed to the forced confession tactics of the confrontational approach.<sup>203</sup> Some view this approach as being soft on offenders.<sup>204</sup>

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190. *Id.* at 367.

191. *Lile v. McKune*, 224 F.3d 1175, 1192 (10th Cir. 2000), *rev'd*, 536 U.S. 24 (2002).

192. Tanabe, *supra* note 6, at 850 (citing *New Jersey v. Portash*, 440 U.S. 450, 457-58 (1979)).

193. *Lile*, 224 F.3d at 1192.

194. Kaden, *supra* note 9, at 385-86.

195. *See id.* at 365-370.

196. *Id.* at 368.

197. *Id.*

198. *Id.*

199. *See McKune v. Lile*, 536 U.S. 24, 29-33 (2002).

200. *Id.* at 33-34.

201. Kaden, *supra* note 9, at 368.

202. *Id.*

203. *See id.* at 368-69.

204. *See id.* at 369.

Finally, there are other modes of treatment that do not utilize the confrontational approach nor revolve around forcing participants to admit responsibility.<sup>205</sup> One of these alternative methods is called metaconfrontation.<sup>206</sup>

[M]etaconfrontation . . . recognizes the protective function that denial serves for offenders, and aims to induce eventual acceptance of responsibility by expressing empathy for the offenders' initial need to deny . . . . [It] is directed toward offenders who do not respond well to direct confrontation and who might otherwise have been deemed untreatable because of the perceived intransigence of their denial.<sup>207</sup>

This approach is best suited for offenders who are dependent upon their defenses.<sup>208</sup> It is aimed at exposing the bases for denial and then dealing with them so that the offender may accept responsibility for his actions.<sup>209</sup> There are no forced confessions in this method, thus avoiding Fifth Amendment constitutional issues.<sup>210</sup>

## VII. CONCLUSION

"The Fifth Amendment right against self-incrimination provides us with some of our most treasured protections."<sup>211</sup> Although the *Lile* decision provided some very broad guidelines for how to determine whether a Fifth Amendment violation has occurred, it did not specifically rule on what constitutes compulsion in the prison context.<sup>212</sup> It left a gap that could potentially increase the severity of constitutional violations; a gap that could be closed with some narrower guidelines.<sup>213</sup>

The Kansas SATP is a program that has significantly attributed to the rehabilitation of sex offenders.<sup>214</sup> However, contrary to the plurality's conclusion, the way in which the program operates increases the likelihood of violating a prisoner's Fifth Amendment rights.<sup>215</sup> This problem may be remedied in a number of ways: 1) by the above mentioned suggestion of

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205. *See id.*

206. *See id.* at 370.

207. Kaden, *supra* note 9, at 370.

208. *See id.*

209. *Id.*

210. *See id.*

211. *State v. Reyes*, 2 P.3d 725, 733 (Haw. Ct. App. 2000).

212. *Lile*, 536 U.S. at 47.

213. *See id.*

214. *See id.* at 34.

215. *See id.* at 70-71 (Stevens, J., dissenting).

narrowing the guidelines to determine what consequences are significant enough to create compulsion;<sup>216</sup> 2) by offering immunity to participants, thereby eliminating the possibility of Fifth Amendment violations;<sup>217</sup> or 3) by implementing alternative forms of treatment.<sup>218</sup>

Heidi Feldman<sup>219</sup>

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216. *See supra* section V.B.

217. *See supra* section VI.A.

218. *See supra* section VI.B.

219. J.D. Candidate, 2004, Pepperdine University School of Law.